FILE COPY

Office - Supreme Co
FILE
NOV 4 19
CHARLES ELMORE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1949

No. 284

LOUIS BERNARD LAPIDES,

Petitioner,

vs.

J. HOWARD McGRATH, ATTORNEY GENERAL, AND WATSON B. MILLER, COMMISSIONER OF THE IMMIGRATION AND NATURALIZATION SERVICE

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITION FOR REHEARING

JACK WASSERMAN,
IRVING JAFFE,
WILL MASLOW,
501 13th St., N. W.,
Washington 4, D. C.,
Attorneys for Petitioner.

ABRAM ORLOW,
Of Counsel.

INDEX

Statement	1
Basis for Rehearing	3
Certification Pursuant to Rule 33	5
Conclusion	5
Appendix	7

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1949

No. 284

LOUIS BERNARD LAPIDES,

Petitioner,

vs.

J. HOWARD McGRATH, ATTORNEY GENERAL, AND WATSON B. MILLER, COMMISSIONER OF THE IMMIGRATION AND NATURALIZATION SERVICE

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITION FOR REHEARING

Petitioner prays, pursuant to Supreme Court Rule 33, for rehearing of the Court's order of October 24, 1949 denying certiorari herein.

Statement

Petitioner, a native of Austria, was naturalized as an American citizen in 1928. He lived in the United States for twelve years from 1922 until 1934. Because he resided in Palestine for five years subsequent to October 13, 1941, the effective date of 8 U. S. C. 804(c) [Section 404(c), Nation-

ality Act of 1940] it has been held that he was expatriated. During the greater part of this five year period, World War II interrupted transportation facilities and made return by petitioner to the United States impossible for reasons beyond his control. (Senate Report 352, 80th Congress, 1st Session).

The decision below was by a divided court. 176 F. (2d) 619. Judge Edgerton in a dissenting opinion stated that petitioner was deprived of his citizenship under a statute which was unconstitutional (1) because it unlawfully discriminated against naturalized citizens and (2) because it effected involuntary expatriation without considering the ability or inability of an individual to return to the United States. The dissent called attention to the repeated expressions of this court that "Under our Constitution, a naturalized citizen stands on an equal footing with the native citizen in all respects, save that of eligibility to the Presidency". 176 F. (2d) 622 and footnote 1. The majority of the court below without reference to and in disregard of these Supreme Court expressions, held that the history of 8 U. S. C. 804 accounts for its application to naturalized citizens alone. Without distinguishing between the various subsections of 8 U. S. C. 804 the majority stated that "the statute has a purpose in the international policy of our government" and that it was needed to "lessen friction with foreign governments growing out of disputes as to the nationality of our naturalized citizens." And it necessarily concluded that the expatriation of certain classes of naturalized citizens (native born citizens, naturalized citizens who are World War I veterans, or natives of Puerto Rico and certain other naturalized citizens are exempt from 8 U. S. C. 804. See 8 U. S. C. 805, 806) had a reasonable relation to the object sought to be obtained and that the classification made by the statute was therefore constitutional. 176 F. (2d) 620.

Basis for Rehearing

1. The respondent urged, and the court below predicated its opinion (176 F. (2d) 619) that the statute herein [8 U. S. C. 804(c)] was constitutional upon the proposition that the statute had a reasonable relation to the international policy of our Government. On October 28, 1949 counsel discovered an official statement of the State Department, annexed as Appendix herein, which conclusively establishes that 8 U. S. C. 804(c) has not and never had, a reasonable relationship to our foreign policy. This statement was made in support of the State Department's continuing efforts to have 8 U. S. C. 804(c) repealed. The Department of Justice has consistently opposed such repeal.

This State Department declaration was available to the government but was not disclosed to this court or to the court below. In fact, respondent deliberately asserted a contrary position. This statement has never been made public and was not available to petitioner until October 28, 1949. It reveals that the State Department charged with our foreign policy considers that 8 U.S.C. 804(c) "does not serve the interests of the United States" and is "disadvantageous to the United States" (Appendix pp. 7, 9). In addition the Department of Justice itself acknowledges the involuntary aspects of expatriation under this statute by conceding that there are "a number of naturalized citizens of the United States residing in foreign countries who, *for reasons beyond their control,* have lost their citizenship because of their failure to return to the United States by October 14, 1946" (See Appendix p. 10. Letter from the Assistant Attorney General to Senator Wiley). Compare these expressions with the assertion of the Government in its brief that the provisions of 404 of the Nationality Act (8 U.S.C. 804) "are entirely fair and

reasonable and are based upon solid considerations of national interest." (Brief in opposition p. 14.)

Indeed, the failure of the Government to differentiate between the several subsections of Section 404 (8 U.S.C. 804) when it speaks of policy considerations in the statute's legislative history is misleading and deals in half-truths. The legislative history shows policy considerations relating to national interest only in support of subsections (a) and (b) of Section 404 (8 U.S.C. 804). There are no such considerations to support enactment of Section 404(c) (8 U.S.C. 804(c)). Subsections (a) and (b) of the statute relate to naturalized citizens who return to their countries of origin or to countries of which they were formerly nationals. These naturalized citizens, and only these, presented problems of national interest. Subsection (c) refers to naturalized citizens who go to third countries, with which they have no former ties. They present no problems in such countries different from problems posed by native-born American citizens who reside in the same foreign countries. Thus, the legislative history does not support any basis for classification or discrimination under 404(c) (8 U.S.C. 804(c)). There are stated bases for such classification in the legislative history of Section 404(a) and (b) (8 U.S.C. 804(a), (b)). The Government erroneously extends these latter considerations to Section 404(c) (8 U.S.C. 804(c)).

The Department of Justice in the instant case did not fully and fairly inform the court of all the facts relative to the policy of the Government and the history of 8 U.S.C. 804(c). Its failures in this regard are noted above and in the brief filed by the Amicus Curiae herein. The expressions of the State Department are at such great variance with the views taken by respondents and have such a material bearing on the constitutionality of the

statute herein that petitioner believes that rehearing is appropriate.

2. The Department of Justice has acknowledged that "a number" of naturalized citizens were involuntarily expatriated by residence abroad under 8 U.S.C. 804(c). (Appendix p. 10). That there were many such cases has been reported to the Department of State. [See Involuntary Loss of American Citizenship p. 16, Report of Special Committee on Expatriation, National Council on Naturalization and Citizenship (March 1947).] The State Department refers to specific groups of such persons (Appendix p. 8).

In at least two such cases, litigation has been instituted in the District Court for the District of Columbia challenging the constitutionality of the statute herein. (Nos. 2329/1949; 2390/1949). It is therefore apparent that the issues involved here should be resolved by the Supreme Court to avoid repetitive litigation over this important problem of citizenship.

Certification Pursuant to Rule 33

Pursuant to Rule 33 as amended counsel certifies that this petition is presented in good faith and not for delay and that it is restricted to the substantial grounds noted above which were available to petitioner but not previously presented. That as noted above the documents upon which this petition is based were not open to the public and did not come to counsel's attention until October 28, 1949.

Conclusion

Petitioner has been deprived of the precious right of American citizenship under a statute which a divided court below believed constitutional. This case is the first

one to challenge the constitutionality of this statute. In view of the conflict in the court below on this important issue of citizenship, the declaration of the State Department that the statute is detrimental to the interests of the United States—a declaration which was not heretofore considered, in view of lack of support in the legislative history of 8 U.S.C. 804(c) for the majority opinion below and in view of the repeated expressions of this court in conflict with the opinion below, petitioner respectfully requests rehearing and that certiorari be granted.

Respectfully submitted,

JACK WASSERMAN,
IRVING JAFFE,
WILL MASLOW,
501 13th St., N. W.,
Washington, D. C.,
Attorneys for Petitioner.

ABRAM ORLOW,
Of Counsel.

APPENDIX

LETTER OF JULY 15, 1947 FROM ASSISTANT SECRETARY OF STATE TO SENATOR FRANCIS J. MYERS

"Dear Senator Myers:

The Department has received your letter of June 13, 1947 requesting its views on the amendment which you intend to propose to S. 518, a bill "To amend the Nationality Act of 1940 to preserve the nationality of citizens who were unable to return to the United States prior to October 14, 1946." Your proposed amendment has as its principal purpose the repeal of subsection (c) of Section 404 of the Nationality Act of 1940, as amended. It also provides that no person shall be deemed to have lost his nationality because of the application of the provisions of the subsection just mentioned.

The Committee appointed by Executive order of November 25, 1933 consisting of the Secretary of State, the Attorney General and the Secretary of Labor to revise the nationality laws of the United States, to recommend revision and to codify the nationality laws of the United States into one nationality law for submission to the Congress did not recommend the enactment of the provision of law now embodied in subsection (c) of Section 404. The considerations which would seem to justify the expatriation of a naturalized American citizen who resides for three years in the territory of a foreign state of which he was formerly a national or in which the place of his birth is situated, as now provided in subsection (b) of Section 404 of the Nationality Act, do not have the same force with respect to a naturalized American citizen who does not reside in such a country. The latter would be less apt to resume his former ties and affiliations and to give allegiance to the country of residence rather than to the United States. The experience of the Department has strongly inclined it to the opinion that subsection (c) of Section 404 of the Nationality Act does not serve the interests of the United States. It would seem, particularly at this time, that the interests of the United States would best be served by permitting American citi-

zens to reside in various parts of the world, except in the cases of naturalized American citizens who reside in the countries of which they were formerly nationals or in which the places of their birth are situated, without the possible penalty of loss of citizenship by the mere fact of residence. Many persons who were naturalized as American citizens, some of whom are now considered to have lost their citizenship under subsection (c) of Section 404 of the Nationality Act have promoted in a substantial manner the interests of this country. Some have resided abroad solely or principally for the purpose of promoting American trade and commerce although, not being direct representatives of American business organizations having their principal offices or places of business in the United States from which they receive substantial compensation, they do not come within the exceptions provided in subsection (b) of Section 406 of the Nationality Act. Others who have been considered to have lost citizenship under subsection (c) of Section 404 of the Nationality Act are physicians, dentists, engineers or persons who pursue other professional or scientific occupations, almost all of whom resided in the United States for many years, were educated or trained in this country and have followed their professional and scientific occupations in foreign countries. Experience has indicated that it is likely that naturalized citizens who are educated or trained in the United States for professional and scientific pursuits have in general a good American background and that their presence abroad promotes American interests and prestige. Some American organizations carry on their foreign business through foreign corporations but obtain for such foreign corporations personnel trained in the United States by the American organizations. While such personnel cannot be considered as representatives of American organizations within the meaning of subsection (b) of Section 406 of the Nationality Act they nevertheless serve the interests of American organizations by their technical knowledge of American procedures and operations and hence in a substantial way serve the interests of the United States. In the past because of adverse economic conditions in

Puerto Rico and the Virgin Islands thousands of the natives have gone to various parts of the Western Hemisphere under foreign sovereignty to obtain employment. Those who were born before the United States became sovereign in Puerto Rico and the Virgin Islands and have remained in any one foreign country in the Western Hemisphere for a period of five years are considered to have lost citizenship in the United States under subsection (c) of Section 404 of the Nationality Act since they are considered naturalized American citizens within the meaning of the term "naturalization" as defined in Section 101(c) of the Nationality Act. The section of law under discussion is considered by the persons concerned as unjust in its application to them since they were born and resided most of their lives in territory which for many years has been under American jurisdiction. Only a few categories of cases have been discussed; there are, however, many other categories of cases equally meritorious which have not been discussed.

It is the considered opinion of the Department that subsection (c) of Section 404 of the Nationality Act should be repealed, since it is believed in general to be disadvantageous to the United States, requiring it to withdraw citizenship from many persons who were naturalized in good faith in the United States and who while abroad have actively and substantially promoted the interests and prestige of the United States and leaving such persons in the situation of being stateless. If some objection might be made on the ground that some naturalized American citizens who in no sense promote the interests or prestige of the United States would by the repeal of the subsection under discussion be able to retain their American citizenship while continuing to reside abroad, it should not be overlooked that in unmeritorious cases the Department could in the exercise of its discretion decline to accord documentation as American citizens to the persons concerned or to protect them should they be involved in incidents resulting in their request for diplomatic protection on the part of the United States.

Because of the urgency of the matter this letter has not been cleared with the Bureau of the Budget, to which a copy is being sent.

A copy of this letter is being sent to the Chairman of the Senate Committee on the Judiciary.

Sincerely yours,

FOR THE SECRETARY OF STATE:
—— ——, *Assistant Secretary*"

EXCERPT FROM LETTER OF JANUARY 29, 1948 FROM PEYTON FORD, THE ASSISTANT TO THE ATTORNEY GENERAL, TO SENATOR ALEXANDER WILEY.

"It is understood that there are a number of naturalized citizens of the United States residing in foreign countries who, for reasons beyond their control, have lost their citizenship because of their failure to return to the United States by October 14, 1946. If the bill under consideration is intended to provide relief in such cases it is believed that such purpose could better be accomplished by amending Section 409 so that a person who had failed to return to this country by October 14, 1946, could retain his nationality if he returned by October 14, 1948. If it should be found later that world conditions are such that by that date there are still deserving cases who have been unable to return here, consideration may be given to a further extension of time."